UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

LUCE & SON, INC.,
Respondent

and **Case 32-CA-21415**

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS AND PROFESSIONAL, CLERICAL, PUBLIC AND MISCELLANEOUS EMPLOYEES LOCAL UNION NO. 533, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Charging Party Union

Jeffrey L. Henze, Esq.,
for the General Counsel
Wayne D. Landsverk, Esq.,
for the Respondent
Dan Montgomery,
for the Charging Party Union

DECISION [1]

Albert A. Metz, Administrative Law Judge. The issues presented are 1.) did a letter the Respondent sent to striking employees violate Section 8(a)(1) of the National Labor Relations Act, 2.) did the Respondent violate Section 8(a)(1) and (3) of the Act by failing to timely reinstate striking employees, and 3.) did the Respondent violate Section 8(a)(1) and (5) of the Act by failing to negotiate about the use of nonunit employees to perform unit work. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact.

[1] This matter was heard at Reno, Nevada, on October 9, 2004. All dates in this decision refer to 2004 unless otherwise stated.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is engaged at Reno, Nevada, in the non-retail distribution of beer, wine and liquor. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

A. Respondent's Business Operations

Since at least 1980 the Union has represented a unit of the Respondent's employees who work as truck drivers, warehousemen, shipping and receiving employees, and part-time utility employees. At the material time there were approximately 46 employees in this unit.

The majority of the unit employees are truck drivers and they commonly have starting times between 4 a.m. and 9 a.m. They are responsible for delivering and checking in product to the Respondent's customers. Approximately 15 unit employees work as warehousemen and most of them work a night shift commencing at approximately 5:30 p.m. They typically are responsible for loading the trucks so they are ready for drivers in the morning. The remaining warehouse and receiving employees work the day shift where they unload merchandise from suppliers and organize the warehouse.

The Respondent also employs ten merchandisers and twelve salesmen. Merchandisers help drivers stock the Respondent's products at customer's locations and build product displays. Salesmen take the customers orders and also do some merchandising. The Respondent additionally employs approximately six or seven supervisors.

B. Collective Bargaining History and Strike

Over the years the parties have negotiated several collective-bargaining agreements pertaining to the unit employees. The most recent of these agreements expired on January 31. The parties have been engaged in negotiations for a successor agreement but have not reached agreement for a new contract. By late May 2004 the Union became frustrated by the fact that no new agreement had been concluded. Thus at approximately 2:40 p.m. on Tuesday, May 25, the Union sent the Respondent a letter which stated:

> You are hereby given notification by Teamsters Local 533 that on Tuesday, May 25, 2004, at 2:30 p.m., individuals in the bargaining units represented by Local 533 will engage in an unfair labor practice work stoppage or strike. Peaceful unfair labor practice picketing will occur at the company's premises and any location the company uses replacement workers.
>
> All such activities will cease Friday, May 28, 2004, at 6:00 a.m., and an unconditional offer to return to work is hereby made on behalf of all persons in the above-described bargaining units on May 28, 2004 at 6:00 a.m. (G.C. Exh. 5)

The strike commenced almost immediately upon receipt of this letter by the Respondent. This was the only strike the Union had conducted against the Respondent in at least the past 10 years. Although the Union's letter stated the strike was an unfair labor practice strike, the Government takes the position that the ensuing strike was a protected concerted economic strike.

The following afternoon the Union's business representative, Dan Montgomery, was outside Respondent's facility picketing with unit employees. At that time Montgomery engaged the Respondent's President, Gerald Hicks, in conversation and asked Hicks if he was going to allow the Union members to return to work on Friday. Hicks responded that the Union would be receiving a letter from Respondent about the matter.

Brad Hicks, Respondent's Director of Sales and Operations (and son of Respondent's President, Gerald Hicks) testified that, either later on Wednesday May 26 or on the morning of May 27, Montgomery telephoned him. Montgomery said he would modify the Union's return to work offer for unit employees by having the striking night shift workers return to work on Thursday evening at their regular start times. Hicks rejected Montgomery's offer and told him that the Respondent already had people scheduled to perform that work.

Montgomery modified the Union's offer to return because of his concern for the employees' holiday pay. Saturday, May 29, 2004, was the start of the Memorial Day holiday. In order for the Respondent's employees to qualify for holiday pay they must work both the day before and the day after a holiday. Thus the night shift employees would have had to work the evening of Thursday, May 27, in order to be paid for the holiday. The Union's original offer for all employees to return to work starting at 6:00 a.m. on Friday, May 28, would have precluded the night shift employees from being eligible for the holiday pay.

C. The Respondent's Letter to Strikers

The Memorial Day holiday time is the third busiest annual work period for the Respondent due to its customers heightened demand for product. Brad Hicks testified that he and his father discussed the Union's strike notice letter and were concerned that the Union would not honor its offer to return to work or, if the strikers did return, that they would not finish their work and stop in the middle of the day as they had when commencing the strike. The Respondent based part of its mistrust about the striking employees returning to work upon the Union's written return offer that had the effect of precluding the night shift employees from being eligible for Monday, May 31, holiday pay. The Respondent also reasoned that the Union's strike was an unprotected work stoppage. Accordingly, on Wednesday, May 26, Gerald Hicks sent the Union and each striking employee a letter stating in relevant part:

> [T]he Company has taken immediate steps to protect those valued customers who need and deserve our ongoing support. For the remainder of this week, work schedules have been developed and all work activity is being handled to satisfy our customers. There will be no need for any additional staffing before 6:00 a.m., Tuesday, June 1, 2004. At that time, strikers may report for work, with the following understanding.

> The Union's tactic represented by your letter has all the earmarks of an unprotected work stoppage. Employees who engage in an unprotected work stoppage are subject to discharge. Please be advised that if there is a recurrence of this or similar tactics, the Company will consider it an unprotected intermittent action, and any participants will be subject to discharge.
>
> Please be further advised that if the strikers do not report for work on Tuesday, June 1, 2004, as stated above, they will be subject to permanent replacement. (G.C. 6).

It is not disputed that the Respondent never asked the Union for assurances that, if Respondent accepted the Union's offer to return to work, that the strikers would report to work as promised and thereafter remain on the job. Montgomery testified that had the Respondent sought such assurances the Union would have agreed in order that the striking employees could have returned to work and received their holiday pay.

The Respondent argued at the hearing and in its post-hearing brief that another reason it did not accept the Union's offer to return to work was the 6:00 a.m. Friday morning return time mentioned in the offer. The Respondent noted that most employees usually started work before that time. The Respondent never mentioned to the Union that the return time was a problem. The Respondent's position statement given to the Board during the investigation of the case does not cite the start time as a reason the strikers were not reinstated pursuant to their offer. The Respondent's answer did not plead the start time as a barrier to a return to work. The Respondent's May 26 letter to the strikers does not declare the 6:00 a.m. time was an impediment regarding reinstatement. The same letter notifies the strikers that the Respondent wanted them to return to work at 6:00 a.m. on Tuesday, June 1. I do not credit the Respondent's belated defense that the offered start time was a reason the strikers were not promptly reinstated. I do find, based on the record as a whole, that the Respondent's mistrust of the Union's intentions for future strike action was the sole reason the Respondent did not timely reinstate the strikers.

D. The Delayed Reinstatement of the Economic Strikers

In early 2004 the Respondent had made a contingency plan to guarantee its continuous operations in the event of a strike. The Respondent notified its salesmen, merchandisers, and supervisors that they would be required to do unit work in the event of a strike. The Respondent also employed the services of an employment agency, AppleOne, to provide temporary employees should a strike occur. The Respondent's agreement with AppleOne did not necessitate the Respondent giving advance notice of its need for temporary employees, and it did not have to guarantee the temporary employees any minimum number of days' work. The Respondent did agree that once an AppleOne temporary employee reported to work the employee was guaranteed four hours pay. There would be no obligation to pay the four hour minimum if the Respondent canceled the request for the temporary employee before he reported to work.

When the Respondent received the Union's May 25 strike letter, it arranged with AppleOne to immediately dispatch temporary warehouse employees for work that afternoon. The Respondent also assigned its salesmen, merchandisers, and managers to do unit work. In addition, several bargaining unit employees crossed the picket line and performed their regular work during the strike. The Respondent's business remained open on Friday and Saturday, May 28 and 29, and on Monday, May 31 using these employees. The Respondent allowed the striking employees to return to work at 6:00 a.m. on Tuesday, June 1. The Respondent did not notify or offer to bargain with the Union about the decision or the effects of its decision to use nonunit employees and temporary workers to perform unit work at times after the striking employees had offered to return to work.

III. ANALYSIS

A. Delay in Reinstatement

The Board addressed the issue of the reinstatement of economic strikers in ***Zapex Corp.***, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980), a case in which the respondent violated Section 8(a)(3) by failing to reinstate economic strikers following their unconditional offer to return to work. The Board stated:

> Certain principles governing the reinstatement rights of economic strikers are by now well settled. In ***NLRB v. Fleetwood Trailer Co., Inc.***, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to `legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer."

In the instant case there is no evidence that the Union planned or threatened to engage in any additional strikes or other types of work stoppages. The Respondent never presented the Union with its concerns about further work stoppages. To the extent that the Respondent considered the Union's unconditional offer to return to work as being unclear as to its future strike intentions, it was incumbent upon the Respondent to pursue the matter. ***Home Insulation Service***, 255 NLRB 311, 312(1981), enfd. mem. 665 F. 2d 352 (11th Cir. 1981)("Where ... ambiguity remains unclarified due to Respondent's decision to ignore the [offer to return to work] and not seek clarification, Respondent may not be heard to complain if such uncertainty is resolved against its interest.") See also, ***Haddon House Food Products***, 242 NLRB 1057 fn. 6 (1979); ***Okla-Inn, d/b/a Holiday Inn of Henryetta***, 198 NLRB 410 (1972). Instead of seeking assurances from the Union about the sincerity of its offer, the Respondent rejected that offer and sent its letter to the Union and employees stating its position that the strike was illegal. That letter also set forth the terms under which the strikers could, belatedly, return to work.

The Respondent argues that the Union's strike was not protected because it was either a partial strike or an intermittent strike. The record does not support these assertions. Thus, the evidence shows that the striking workers ceased their work on the afternoon of May 25 and made

the offer to return to work shortly thereafter. No evidence was presented that the striking employees intended not to perform their full duties once they returned to work (*partial strike* – a strike that involves employees performing only part of their job functions while accepting their pay and avoiding the risks and disadvantages of a complete strike action. ***Vic Koenig Chevrolet***, 263 NLRB 646, 650 (1982)), or that they would engage in a series of quick strikes (*intermittent strikes* - a series of unprotected hit and run strikes. ***Pacific Telephone & Telegraph Co.***, 107 NLRB 1547 (1954)). The Respondent presented no evidence in support of its assertion the strike was of either of these types of work actions. I find, therefore, that the Union's strike was a protected economic work stoppage.

The Union made two unconditional offers to return to work that the Respondent rejected. First, the Union made the original offer in its May 25 letter ("[A]n unconditional offer to return to work is hereby made on behalf of all persons in the above-described bargaining units on May 28, 2004, at 6:00 a.m." (G.C. 5)). Second, Montgomery repeated the unconditional offer to return to work during a telephone conversation with Brad Hicks on Wednesday afternoon or Thursday morning. In that conversation, Montgomery modified the Union's offer to return to work by stating the night shift employees would unconditionally return to work on Thursday night at their regular starting times. Brad Hicks admitted that the Union never placed any conditions on the offers to return to work. Montgomery's uncontroverted testimony related that at the picket line on the afternoon of May 26 when he asked Gerald Hicks if the Respondent was going to let the strikers return to work on Friday, Hicks replied that the Union would be getting a letter. The Respondent's subsequent letter responding to the unconditional offers was to accuse the Union of illegal activity and threatening the employees with discharge should they engage in future similar strike conduct.

An employer discourages employees from exercising their rights to organize and strike guaranteed by Sections 7 and 13 of the Act when it refuses to reinstate economic strikers upon their unconditional offers to return to work at the conclusion of a strike. *Fleetwood Trailer*, supra. The General Counsel established a prima facie case of unlawful discrimination by proving that the economic strikers made an unconditional offer to return to work and that the Respondent unlawfully delayed their reinstatement until June 1, thereby presumptively discouraging the exercise of their rights under the Act. It was the Respondent's burden to show that its failure to offer reinstatement was due to "legitimate and substantial business justifications." The Respondent's defense to its delay in granting reinstatement to the strikers was its concern about prospective strike action by the Union. This concern it did not disclose to the Union. I find that the Respondent's unexpressed apprehension does not meet the Board and courts' test of showing a legitimate and substantial business justification for its conduct in refusing to timely reinstate the economic strikers.

I find that the Respondent rejected the Union's written and verbal offers to return to work on Friday morning, May 28, as well as its modified offer to return the night shift crew on the evening of Thursday, May 27 and, thereby, unlawfully delayed their return to work until Tuesday morning, June 1. I conclude that the Respondent's refusal to immediately reinstate the striking employees was a violation of Section 8(a)(1) and (3) of the Act. ***Allied Mechanical Services***, 341 NLRB No. 141, slip op. at 2 (2004); ***Laidlaw Corp.***,171 NLRB 1366, 1369-70 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

B. Respondent's May 26 Letter

The Amended Complaint alleges that each of the following statements contained in the Respondent's May 26 letter to striking employees violated Section 8(a)(1) of the Act:

1. The Respondent considered their economic strike to be "an unprotected work stoppage (and) employees who engage in an unprotected work stoppage are subject to discharge;"
2. "If there is a recurrence of this or similar tactics, the Company will consider it an unprotected intermittent action, and any participants will be subject to discharge;" and,
3. The Respondent would not permit any of the strikers to return to work until Tuesday, June 1.

It is well-established that threats of discharge made to economic strikers violate Section 8(a)(1) of the Act. ***Gloversville Embossing Corp.***, 297 NLRB 182, 183 fn. 5 (1989). I find that Respondent threatened the strikers with discharge for what it mischaracterized as their existing or potentially similar "unprotected" strike actions. I conclude that such threats were a violation of Section 8(a)(1) of the Act.

The Respondent's letter also notified the strikers of the delay in their return to work until June 1. As I have found that this delay was a violation of Section 8(a)(3) of the Act, I conclude that notifying the strikers of such unlawful delay was an independent violation of Section 8(a)(1) of the Act.

C. The Refusal to Bargain Allegation

The Government alleges that the Respondent violated Section 8(a)(5) of the Act by using non-bargaining unit temporary agency employees, salesmen, merchandisers, and managers to perform unit work after the time that the strikers had offered to return to work e.g. Thursday night, May 27; Friday, May 28; Saturday, May 29; and Monday, May 31.

There is no evidence that the parties were at impasse when Respondent assigned unit work to non-unit employees during the period from May 27 to June 1. The Respondent did not provide the Union with advance notice or an opportunity to bargain over this decision or the effects of its decision on bargaining unit employees. The performance of bargaining unit work is a mandatory subject of bargaining. ***J.W. Rex Co.***, 308 NLRB 473 (1992). See also, ***NLRB v. Katz***, 369 U.S. 736, 743-748 (1962). There is no evidence that the parties bargained over this decision or the effects of this decision on the unit employees. As I have found that the Respondent unlawfully delayed the strikers' reinstatement from May 27 until June 1, I further find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to notify and bargain with the Union over the assignment of unit work to non-unit employees during this same period. *J.W. Rex Co.*, supra at 498.

CONCLUSIONS OF LAW

1. The Respondent, Luce & Son, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen & Helpers and Professional, Clerical, Public and Miscellaneous Employees Local Union No. 533, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1), (3) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[2]

ORDER

The Respondent, Luce & Son, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Unlawfully delaying the reinstatement of economic strikers who have unconditionally offered to return to work and unlawfully notifying striking employees of such delay.

(b) Threatening employees with the loss of their jobs if they engage in a protected concerted economic strike.

(c) Refusing to bargain with the Union about using temporary replacement employees after the Union has unconditionally offered to return economic strikers to work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole striking employees whose return to work was unlawfully delayed by the Respondent commencing with the night shift on May 27, 2004, until the employees return to work on June 1, 2004, for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in ***F. W. Woolworth Co.***, 90 NLRB 289 (1950), plus interest as computed in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment about using temporary replacement employees after the Union has unconditionally offered the return to work of unit employees who are economic strikers.

(d) Within 14 days after service by the Region, post at its facility in Reno, Nevada, copies of the attached notice marked "Appendix." [3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 27, 2004. ***Excel Container, Inc.***, 325 NLRB 17 (1997).

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: January 28, 2005

_____

Albert A. Metz
Administrative Law Judge

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully delay the reinstatement of economic strikers who have unconditionally offered to return to work nor unlawfully notify striking employees of such delay.

WE WILL NOT threaten employees with the loss of their jobs if they engage in a protected concerted economic strike.

WE WILL NOT refuse to bargain with the Teamsters, Chauffeurs, Warehousemen & Helpers and Professional, Clerical, Public and Miscellaneous Employees Local Union No. 533, International Brotherhood of Teamsters, AFL-CIO about using temporary replacement employees after the Union has unconditionally offered to return economic strikers to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole striking employees whose return to work we unlawfully delayed.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment about using temporary replacement employees after the Union has unconditionally offered the return to work of unit employees who are economic strikers.

Luce & Son, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street,
Federal Building, Room 300N,
Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.